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DATAWAY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AT&T CORPORATION
Plaintiff,
v.
DATAWAY, INC.
Defendant.

CASE NO. C07-02440 EDL

**UNILATERAL CASE MANGEMENT
STATEMENT**
[F.R.C.P., Rule 16]
CMC DATE: April 15, 2008
Time: 10:00 a.m.
CTRM: E. 15th Floor

DATAWAY, INC.
Counterclaimant,
v.
AT&T CORPORATION
Counterdefendant.

Defendant/Counterclaimant Dataway, Inc. ("DATAWAY") has attempted to meet and confer regarding the filing of a Joint Case Management Statement, but Defendant/Counterclaimant is unable, despite reasonable efforts to obtain the cooperation of Plaintiff/

1 Counterdefendant in the preparation of the joint statement. Therefore, DATAWAY once again
 2 hereby submits its Unilateral Case Management Statement as follows:

3
 4 UNILATERAL CASE MANAGEMENT STATEMENT

5 1. Jurisdiction and Service

6 Plaintiff/Counterdefendant asserts that this Court has subject matter jurisdiction pursuant
 7 to Title 28 U.S.C. §1331 and Title 47 U.S.C. §201 et seq. Both Plaintiff/Counterdefendant and
 8 Defendant/Counterclaimant agree that the Court has jurisdiction, that venue is proper, that
 9 service was sufficient, and that no parties remain to be served.

10
 11 2. Facts

12 Plaintiff and Counterdefendant contends that it is entitled to recover \$ 11,534,67 for calls
 13 placed through the telephone system owned and operated by DATAWAY to the AT&T Network
 14 (Legacy T) by dialing carrier access code 1010288. Plaintiff and Counterdefendant furthermore
 15 contends that DATAWAY disputes AT&T's claims and separately asserts counterclaims for
 16 Breach of Express Contract, Breach of Oral Contract, Fraudulent Inducement to Contract,
 17 Violations of the Telecommunication Act – "Slamming", and Intentional Interference with
 18 Contractual Relations.

19 Defendant/Counterclaimant contends that there are factual issues in dispute.
 20 Defendant/Counterclaimant entered into a contract consolidating all of DATAWAY'S business
 21 telecommunication services with SBC/AT&T. Substantial inducement to this agreement was a
 22 second contract which obliged SBC/AT&T to provide additional slamming protection as a means
 23 to prevent the switching of telecommunication services or providers. SBC/AT&T included this
 24 protection in accordance with 47 U.S.C § 258(a), its implementing F.C.C. Regulations and the
 25 Public Utilities Code section 2889.5, preventing telecommunication carriers from making
 26 unauthorized changes to subscribers' telephone service. Despite SBC/AT&T's knowledge of a
 27
 28

1 previously occurred pattern of illegal usage, AT&T reassured DATAWAY that its contracts will
2 be continued by AT&T after it acquired SBC. DATAWAY built on Plaintiff/
3 Counterdefendant's representations that DATAWAY would not be charged anything but its
4 contractual rate, be charged only for the service it authorized, and that AT&T faithfully assumes
5 SBC's business and obligations. On July 24, 2006 hackers accessed DATAWAY's voice mail
6 system using AT&T's Legacy T network. Legacy T is a service DATAWAY never subscribed
7 to, nor did DATAWAY authorize AT&T/SBC to establish any accounts or services on the
8 Legacy T system. The calls were placed by unknown, unauthorized third persons. AT&T billed
9 these calls to DATAWAY at a rate of \$ 5.78 per minute. According to DATAWAY's contractual
10 long distance plan, calls to the Philippines should cost \$ 0.30 cents per minute. AT&T did allow
11 a switching to a non-contractual rate, and created an account for DATAWAY without any
12 authorization with the only argument that the routing number of the calls pointed to
13 DATAWAY. Furthermore, on November 3, 2006, AT&T sent a Disconnect Notice to
14 DATAWAY, threatening DATAWAY to disconnect its authorized account even though
15 DATAWAY made payments for these accounts at all times. On September 20, 2006,
16 DATAWAY contacted AT&T's local managers regarding the disputed calls and requested the
17 removal of the disputed charges from its accounts. An oral agreement was reached in which
18 AT&T represented to DATAWAY that AT&T would waive its charges for the fraudulent calls
19 once DATAWAY formally disputed them. On November 10, 2006, DATAWAY submitted a
20 written denial and sent a duly completed form to AT&T's Fraud Resolution Group with copies to
21 AT&T. Even though the threatened disconnection was suspended and DATAWAY was, once
22 again, reassured that AT&T would drop all charges, DATAWAY was notified in January 2007,
23 that AT&T referred the dispute to an attorney for collection and would judicially enforce its
24 alleged claims. Moreover, DATAWAY contacted four administrative authorities, the F.C.C, the
25 C.P.U.C., U.C.A.N. and T.U.R.N. for assistance in resolving its dispute with AT&T, commenced
26 informal proceedings which AT&T barred by its insufficient and fraudulent settlement offer.

1 3. Legal Issues

2 Plaintiff and Counterdefendant contends that DATAWAY is strictly liable for the
3 charges. [AT&T Corp. v. Community Health Group, 931 F.Supp. 719, 723 (S.D.Cal. 1995);
4 AT&T v. New York Human Resources Administration, 833 F.Supp. 962 (S.D.N.Y. 1993),
5 AT&T v. Jiffy Lube Int'l Inc. (D.Md. 1993) 813 F.Supp. 1164, and AT&T v. Intrend Ropes &
6 Twines Inc., 944 F.Supp. 701 (C.D.Ill. 1996).]

7 Defendant/Counterclaimant contends that this is an action for Breach of Contract brought
8 by AT&T, that DATAWAY did not receive any services and is not strictly liable for the
9 unauthorized calls as well as the unauthorized account. DATAWAY contends that it has the
10 following affirmative Defenses: Third Party Conduct; Doctrine of Waiver; Failure to Mitigate;
11 Doctrine of Unclean Hands; Unjust Enrichment; Failure to Exhaust Administrative Remedies;
12 and the Doctrine of Usury. DATAWAY alleges that the application of state law is not preempted
13 by federal law [Ting v. AT&T, 319 F.3d 1126, 1136-1137 (9th Cir. 2003)]. Moreover, the
14 Communications Act would not govern the dispute at hand because DATAWAY is not seeking
15 rate preferences not accorded to AT&T's other customers, or to enforce "side agreements" which
16 vary from published tariffs but the rate it contracted for pursuant to the tariff. The right infringed
17 upon is Plaintiff's right "...not to have AT&T as its [...] service provider without his knowledge
18 and against his wishes." [Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 102 (Cal. Ct. App.
19 2001)]. Further, DATAWAY alleges its counterclaim issues Breach of Express Contract [Qwest
20 Communs. Corp. v. Herakles, 2008 U.S. Dist. LEXIS 22154, 18 (D. Cal. 2008)]; Breach of Oral
21 Contract [W. Reserve Life Assur. Co. v. Bratton, 2007 U.S. Dist. LEXIS 46351 (D. Iowa 2007)];
22 Fraudulent Inducement to Contract [Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 102 (Cal. Ct.
23 App. 2001), Modafferi v. General Instrument Corp., 1991 U.S. Dist. LEXIS 14098, 21 (D. Cal.
24 1991)]; Violation of 47 USC §258 Anti-Slamming [In re Best Payphones, Inc., 2007 Bankr.
25 LEXIS 1677 (Bankr. D.N.Y. 2007), AT&T Corp. v. FCC, 323 F.3d 1081, 1082 (D.C. Cir.

2003)] and Tortious Interference with Contractual Relations [Bank of N.Y. v. Fremont General Corp., F.3d, 2008 WL 269458 (9th Cir. 2008)].

4. Motions:

Both AT&T and DATAWAY contend that they anticipate filing a motion for summary judgment. DATAWAY contends moreover that it is filing a motion to compel a response to DATAWAY's Request for Production served upon Plaintiff/Counterdefendant on January 17, 2008, in accordance with the Federal Rules of Civil Procedure and the Northern District Local Rules.

5. Amendment of Pleadings:

No Amendments are contemplated at this time.

6. Evidence Preservation:

No steps need to be taken to preserve evidence relevant to the issues reasonably evident in this action.

7. Disclosures:

AT&T complied with the initial disclosure requirements of F.R.C.P. 26(a) on November 5, 2007.

DATAWAY complied with the initial disclosure requirements of F.R.C.P. 26(a) on October 31, 2007. Both AT&T and DATAWAY made supplemental disclosures on April 7, 2008 in accordance with F.R.C.P. 26(a)(1), 26(e).

8. Discovery:

AT&T contends that it has served written discovery and has set depositions for 10 a.m.

1 and 1 p.m. on April 15, 2008.

2 DATAWAY contends that AT&T served deposition notices for April 11 and 14, 2008,
3 and then requested by e-mail both depositions on April 15, 2008. DATAWAY has agreed to
4 produce Mr. Molieri at 11 a.m. and Mr. Lewis at 1:30 p.m. AT&T failed to meet the local rules
5 when it served its deposition notices by continuously refusing to meet and confer. DATAWAY
6 contends further that it has served written production requests. AT&T has failed to respond to
7 these requests as its "response" was not only submitted the day after same was due, but also did
8 not meet the requirements of F.R.C.P. 37(a)(4) as it objected all fifteen requests by identical and
9 general objections lacking any substance. Furthermore, DATAWAY will respond to
10 Plaintiff/Counterdefendant's Request for Production of Documents requested by AT&T to be
11 due on April 14, 2008. DATAWAY has set depositions for April 11 and 14, 2008.

12
13 9. Class Actions:

14 At this time there is no class action.

15
16 10. Related Cases:

17 There are no related cases or proceedings pending before another judge of this court, or
18 before another court or administrative body.

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20 11. Relief:

21 The complaint seeks \$11,534.67 together with prejudgment interest of \$5.69 per day
22 from September 25, 2006 using the rate of 18% per annum pursuant to AT&T Tariff F.C.C. No.
23 1 Section 2.5.4., plus costs of suit, including reasonable attorney's fees pursuant to AT&T's
24 Tariff F.C.C. No. 1, Section 2.53(E).

25 DATAWAY seeks recovery for Breach of Express Contract, Breach of Oral Contract,
26 Fraudulent Inducement to Contract, Violations of the Telecommunications Act – "Slamming",
27

1 and Intentional Interference with Contractual Relations. It will include its initial estimates of
2 compensatory and punitive damages in its response to Plaintiff/Counterdefendant's Special
3 Interrogatories requested by AT&T to be due on April 14, 2008. Defendant/Counterclaimant
4 contends that whatever DATAWAY's damages are proven to be, it should be awarded treble
5 damages, together with interest, costs, and attorney fees pursuant to 47 U.S.C. §258 . In the
6 event Defendant/Counterclaimant is held liable, Plaintiff/Counterdefendant can only claim a sum
7 computed on the basis on the contractually determined rate for Defendant/Counterclaimant's
8 authorized account.

9
10 12. Settlement and ADR:

11 Both parties participated in ADR by way of mediation held January 25, 2008 which
12 proved unsuccessful.

13
14 13. Consent to magistrate Judge for All Purposes:

15 The parties have consented to have a magistrate judge conduct all further proceedings
16 including trial and entry of judgment.

17
18 14. Other References:

19 This case is not suitable for binding arbitration, a special master, or the Judicial Panel on
20 Multidistrict Litigation.

21
22 15. Narrowing of Issues:

23 This case cannot be narrowed by agreement or by motion. There are no suggestions to
24 expedite the presentation of the evidence at trial (e.g., through summaries or stipulated facts),
25 and no request is being made to bifurcate issues, claims, or defenses.
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1 and no request is being made to bifurcate issues, claims, or defenses.

2
3 16. Expedited Schedule:

4 This case cannot be handled on an expedited basis with streamlined procedures.

5
6 17. Scheduling:

7 Discovery deadline is April 15, 2008. Dispositive filing cutoff is June 10, 2008. Deadline
8 for Expert Disclosure and dispositive motion hearing is July 15, 2008. Expert discovery cutoff is
9 August 15, 2008. The pretrial conference shall be September 19, 2008.

10
11 18. Trial:

12 Trial will be held October 6, 2008.

13
14 19. Disclosure of Non-Party Interested Entities or Persons:

15 Plaintiff/Counterdefendant has filed the "Certification of Interested Entities or Persons"
16 required by Civil Local Rule 3-16. Plaintiff/Counterdefendant restates in this Case Management
17 Statement the contents of its certification by identifying any persons, firms, partnerships,
18 corporations (including parent corporations) or other entities known by the party to have either:
19 (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii)
20 any other kind of interest that could be substantially affected by the outcome of the proceeding,
21 as follows: AT&T Corporation, Plaintiff/Counterdefendant.

22 Defense has filed the "Certification of Interested Entities or Persons" required by Civil
23 Local Rule 3-16. Defendant/Counterclaimant restates in this Case Management Statement the
24 contents of its certification by identifying any persons, firms, partnerships, corporations
25 (including parent corporations) or other entities known by the party to have either: (i) a financial
26 interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind
27

1 of interest that could be substantially affected by the outcome of the proceeding, as follows:

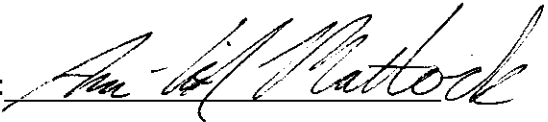
2 DATAWAY, INC, Defendant/Counterclaimant.

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4 20. Other matters:

5 No other matters exist which may facilitate the just, speedy and inexpensive disposition
6 of this matter.

7
8
9 DATED: April 8, 2008

MATLOCK LAW GROUP, PC

10 By: 

11 Anne-Leith Matlock, Esq.

12
13 Attorneys for Defendant/
14 Counterclaimant
DATAWAY, INC.